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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOHN PORTER et al., Plaintiffs and Appellants, v. STEVEN WYNER et al., Defendants and Respondents.	B285926 (Los Angeles County Super. Ct. No. BC347671)

APPEAL from a judgment of the Superior Court of Los Angeles County, Victor E. Chavez, Judge. Affirmed.

Sauer & Wagner, Gerald L. Sauer and Michelle S. Timpe, for Plaintiffs and Appellants.

Browne George Ross, Eric M. George, Peter W. Ross, Ira Bibbero; Tiffany Law Group, Marcy J.K. Tiffany; Wyner Law Group and Steven Wyner for Defendants and Respondents.

INTRODUCTION

Appellants John and Deborah Porter (the Porters) engaged defendants Steven Wyner (Wyner), Marcy Tiffany (Tiffany), and the law firm of Wyner and Tiffany (W&T) to represent them in federal court in an action to compel their school district and the California Department of Education (CDE) to provide special education services to their son. Over the course of the litigation, Deborah, a paralegal by training, worked on her son's case with Wyner, Tiffany, and W&T.

In 2005, the parties to the federal action executed a settlement agreement resulting in an award of $6.73 million in damages to the Porters and their son. Shortly thereafter, a dispute arose between the Porters and W&T as to whether the settlement included compensation for Deborah's paralegal services. The dispute gave rise to years of litigation, including two trials and multiple appeals. After the second trial, the jury found for W&T on all but one of the claims. As to the claim in favor of the Porters, the jury awarded no damages.

The Porters appeal, contending (1) the jury improperly found Deborah was not an employee of Wyner or W&T with respect to the claim for unpaid wages; (2) the court improperly sustained a demurrer to their quantum meruit causes of action; (3) the court erred in admitting evidence barred by mediation confidentiality; (4) the court improperly allowed W&T to proffer evidence that Deborah was in fact compensated for unpaid wages; (5) and defense counsel committed misconduct.

We conclude the Porters' claims are meritless and affirm the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

In 1999, the Porters hired Wyner to represent them in a federal lawsuit against the Manhattan Beach Unified School District (MBUSD) and the CDE to obtain special education services for their son under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400(d)). On or about July 2001, Deborah, a paralegal, began to assist Wyner with the underlying action in exchange for a partial offset to Wyner's legal fees. Deborah and Wyner also agreed Deborah would assist Wyner with some of his other cases.

In 2003, Wyner and Tiffany formed W&T, a law firm. In February 2003, Wyner sent Deborah an e-mail memorializing a discussion they had about the compensation W&T would pay Deborah as a Special Education Advocate and Paralegal. The e-mail indicated W&T would "treat [Deborah] as an employee," withhold taxes, and pay the employer's portion of payroll taxes. In August of 2003, W&T and the Porters entered into a new fee agreement whereby the Porters would pay costs and W&T would defer payment of their fees pending settlement or judgment. The amended agreement provided that the Porters would pay W&T the greater of either a contingency fee or the amount of legal fees accrued over the course of the litigation. In a "side letter" to the amended fee agreement, W&T and the Porters agreed to the following: (1) Deborah would receive compensation for her services only if the fees W&T recovered for its legal fees, less any amount credited to Deborah for her paralegal services, exceeded the total amount of fees owed to W&T by the Porters; (2) if W&T did not recover the full amount of its fees in the underlying action, Deborah's compensation for her work on her son's case would be reduced on a pro rata basis; and (3) if Deborah

recovered the full amount of her lost earnings claim in the underlying federal action for the period of time she worked on her son's case, W&T would not be required to compensate Deborah for her work on the federal case. This August 2003 fee agreement, signed by Wyner, Deborah, and John, makes no mention of whether Deborah would be treated as an employee or an independent contractor.

In January 2005, W&T and Deborah executed another agreement increasing Deborah's hourly wage for all matters upon which W&T collected fees. With respect to the underlying federal action, the agreement provided Deborah a pro-rata adjustment of her hourly wage depending upon W&T's recovery of fees for her time.

In April 2005, the Porters mediated their dispute with MBUSD and the CDE and, in August 2005, the parties executed an agreement whereby MBUSD and the CDE would pay a total of $6,731,650 to the Porters to settle the dispute. In accordance with the terms of the settlement agreement, MBUSD and the CDE paid $1,131,650 for the Porters' son's education; $1.58 million for his future support; $1.65 million for legal fees; and $2.37 million to be deposited to the "Restated Porter Trust of 1991" for all three Porters. The settlement agreement is silent as to the purpose and nature of the $2.37 million awarded to the Porters.

After the settlement monies were paid, a dispute arose between the Porters and Wyner as to whether the $2.37 million awarded to the Porters included the wages she earned while engaged as a paralegal for Wyner and W&T. The Porters claimed Wyner was obligated to reimburse her for the fees and costs they had already paid on the underlying federal action and for the

hours Deborah worked on her son's case and other cases. Wyner claimed the settlement included Deborah's wages and, under the amended fee agreement and side letter from August 2003, Wyner was not obligated to compensate her further.

To resolve the disputes, the Porters filed an action in the Los Angeles Superior Court. In their October 2006 Second Amended Complaint (SAC), the Porters asserted the following causes of action against Wyner, Tiffany, and W&T: breach of fee agreement; nonpayment of wages; waiting time penalties; breach of fiduciary duty; professional negligence; constructive fraud; negligent misrepresentation; rescission; common count for quantum meruit; unjust enrichment; and declaratory relief.[1]

Prior to the filing of the SAC, the trial court had sustained W&T's demurrers to the quantum meruit and declaratory relief causes of action in the First Amended Complaint without leave to amend.

In April 2007, W&T filed a cross-complaint for breach of contract, breach of fee agreement, breach of employment agreement, conversion, and injunctive relief. The court sustained the Porters' demurrers to the cross-claims for injunctive and declaratory relief.

The case proceeded to trial on the SAC and the cross-complaint. The jury found for the Porters on their claims of breach of the fee agreement, nonpayment of wages, and rescission. The jury found W&T did not breach any fiduciary duty and was not liable for constructive fraud, negligent

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[1] The professional negligence and rescission causes of action arose from allegedly incorrect tax advice W&T conveyed to the Porters. As this appeal does not implicate these claims, we have omitted the factual background relevant to them.

representation, or unjust enrichment. As to the cross-complaint, the jury found in favor of the Porters and against respondents. The jury awarded the Porters a total of $262,000 in damages.

W&T appealed, and we granted a new trial. Because W&T had also brought a motion for judgment notwithstanding the verdict (JNOV), we remanded the matter to the trial court with directions to rule on that motion. (*Porter v. Wyner* (July 27, 2011, B211398) [nonpub. opn.].)

The trial court denied the JNOV. We affirmed the order denying the JNOV, and remanded the matter to the superior court for the second trial. (*Porter v. Wyner* (Dec. 18, 2013, B242025) [nonpub. opn.].)

The second trial commenced on April 17, 2017. The jury found in favor of W&T on the claims for breach of fee agreement, nonpayment of wages, waiting time penalties, breach of fiduciary duty, constructive fraud, negligent misrepresentation, rescission, and unjust enrichment. On the cross-complaint, the jury rendered a verdict in favor of the Porters on the claim for breach of contract.

The jury also found W&T was precluded from recovering damages under the doctrine of unclean hands.

The Porters timely appealed, contending: (1) Deborah was W&T's employee, not an independent contractor; (2) the court erred in sustaining the demurrer to their quantum meruit claims; (3) the trial court erred in admitting evidence barred by mediation confidentiality; (4) the trial court erred in permitting W&T to proffer evidence that Deborah was compensated for her wages; and (5) defense counsel committed misconduct.[2]

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[2] On March 17, 2017, Wyner and W&T moved to dismiss the case pursuant to Code of Civil Procedure section 583.360, alleging

DISCUSSION

I. Substantial Evidence Supports the Jury's Finding that Deborah Was Not an Employee of Wyner or W&T

The Porters assert the judgment must be reversed with respect to Deborah's claims for unpaid wages and waiting time penalties in light of the California Supreme Court's ruling in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*). The Porters also claim substantial evidence does not support the jury's determination that Deborah was not an employee of Wyner or W&T for the purpose of determining whether she is entitled to relief for unpaid wages and waiting time penalties. Both contentions are without merit.

A. *Dynamex*

In *Dynamex*, the California Supreme Court adopted a new framework for determining whether workers are employees or independent contractors for the purpose of applying wage orders adopted by California's Industrial Welfare Commission (IWC). (*Dynamex, supra,* 4 Cal.5th at p. 957.) Before *Dynamex*, courts followed the rule set out in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, commonly referred to as the *Borello* test.

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the time to bring the action expired on February 12, 2017. The court denied the motion and the case proceeded to trial on April 17, 2017. In their reply brief, Wyner and W&T do not directly challenge this ruling, which is understandable given they prevailed on most of the claims and owe the Porters no damages. They merely revive this claim to urge us to affirm the judgment because "the Porters were not entitled to a second trial, much less a third one." As Wyner and W&T obviously suffered no prejudice resulting from the court's ruling, we will not entertain the issue.

Here, the Porters brought a claim for non-payment of wages under the California Labor Code. They did not bring any claims asserting violations of IWC wage orders. *Dynamex* unequivocally limited its holding to California wage order claims. "Here we must decide what standard applies, under California law, in determining whether workers should be classified as employees or as independent contractors *for purposes of California wage orders*, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions . . . of California employees." (*Dynamex, supra,* 4 Cal.5th at pp. 913-914.) The *Dynamex* court made clear its holding applies only to this "one specific context." (*Id.* at p. 913.) *Dynamex* did not disturb the Court of Appeal's determination that the *Borello* test applies to non-wage-order claims. We therefore agree with our colleagues in the Fourth District who determined *Dynamex* applies to wage order claims only, and *Borello* remains the applicable standard for causes of action predicated on the Labor Code. (*Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558, 571.)

B. *Borello*

The Porters also allege there is no substantial evidence supporting the jury's conclusion that Deborah was not Wyner or W&T's employee under the *Borello* test.

We review for substantial evidence the determination of employee or independent contractor status. (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 78.) "In reviewing the evidence on appeal, we resolve all conflicts in favor of the prevailing party, and we indulge in all legitimate and reasonable inferences to uphold the finding if possible." (*Air Couriers Internat. v. Employment Development Dept.* (2007)

150 Cal.App.4th 923, 937.) "Our power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, that will support the finding. When two or more inferences can be reasonably deduced from the facts, we cannot substitute our own deductions for those of the trial court." (*Ibid.*)

In determining whether a worker is an employee or independent contractor under *Borello*, the primary factor is whether the worker has " ' "the right to control the manner and means of accomplishing the result desired." ' " (*Dynamex, supra,* 4 Cal.5th at p. 922.) The fact-finder must consider the following factors in making its determination: (1) right to discharge at will, without cause; (2) whether the worker is engaged in a distinct occupation or business; (3) whether the work is usually done under the direction of a principal, or by a specialist without supervision; (4) the skill required in the occupation; (5) whether the worker or the principal supplies the instrumentalities, tools, and place of work; (6) the length of time for which the services are performed; (7) whether the worker is paid by time or by the job; (8) whether the work is part of the regular business of the principal; and (9) whether the parties believe they are creating an employer-employee relationship. (*Ibid.*)

Here, there is substantial evidence supporting the jury's finding that Deborah was an independent contractor rather than an employee. First, when Wyner and Deborah agreed Deborah would work for Wyner as a paralegal, they each signed an agreement explicitly stating "[f]or tax and other purposes, you have been rendering, and will continue [to] render, services as an independent contractor and not as an employee." In addition, the jury heard testimony that Deborah was able to choose which

cases to work on and "often declined to work on something we asked her to work on because she said she didn't have the time." Deborah controlled her own work schedule, and told W&T "when she was going to come in, how long she was going to work, whether she was working at home, whether she was going to be in the office. We never knew. It was entirely up to her." Although W&T provided Deborah a desktop computer and work space at their office, Deborah frequently worked from home and W&T did not provide Deborah with any equipment or supplies to use at home.

The Porters allege substantial evidence does not support the jury's determination that Deborah was an independent contractor and point to examples in the record supporting their argument. The existence of contradictory evidence, however, does not compel the conclusion that no substantial evidence supports the jury's decision. The jury considered all the evidence before it, and we have no authority to "second-guess the conclusion reached by the fact finder; instead, the substantive 'determination (employee or independent contractor) is one of fact and thus must be affirmed if supported by substantial evidence.' " (*Cristler v. Express Messenger Systems, Inc., supra,* 171 Cal.App.4th at p. 78.) Based on the evidence described above, and granting proper deference to the jury's weighing of the evidence, we conclude substantial evidence supports the determination that Deborah was not Wyner's or W&T's employee.

II. The Court Did Not Err by Sustaining the Demurrer to the Porters' Quantum Meruit Cause of Action

In their SAC, the Porters alleged a common count of quantum meruit by Deborah, contending respondents owed her at least $339,556 for her work, labor, and services. The trial

court sustained respondents' demurrer to the quantum meruit count as duplicative of the breach of contract claims.

It is well established that a plaintiff may not "pursue or recover on a quasi-contract claim if the parties have an enforceable agreement regarding a particular subject matter." (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1388.) "[E]quitable entitlement to a quantum meruit payment is not implied where the parties have actual contract terms covering payment." (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1420.) "When parties have an actual contract covering a subject, a court cannot—not even under the guise of equity jurisprudence—substitute the court's own concepts of fairness regarding that subject in place of the parties' own contract." (*Ibid.*)

The Porters allege on appeal the quantum meruit claim is not duplicative of the breach of contract claim because the first cause of action sought reimbursement of costs and fees whereas the quantum meruit claim sought to recover wages. Thus, the Porters allege, they were deprived of their opportunity to obtain equitable relief on the cause of action for nonpayment of wages in the event the jury determined Deborah was not an employee of Wyner or W&T.

Indeed, the first cause of action alleged a breach of the fee agreement, and sought to recover $95,766 as reimbursement for the fees and costs the Porters already advanced to respondents. It did not seek to recover unpaid wages. The second cause of action, however, although pled as a violation of Labor Code section 201, alleges multiple facts seeking to establish that W&T breached the terms of the January 2005 side letter. The Porters allege Deborah billed at least 2,425.40 hours on the underlying

action and, "pursuant to the express terms of the January 3, 2005 Side Letter," W&T was obligated to compensate her. The Porters allege Deborah performed "each and every condition and covenant required of her under and pursuant to the terms and conditions" of the side letter and "[d]efendants have materially breached" the side letter by "failing and refusing" to pay Deborah her wages. The Porters also allege in the second cause of action that W&T breached the implied covenant of good faith and fair dealing in the side agreement. "As a direct and proximate result of Defendants' conduct," the Porters alleged, "there is now due and owing to Ms. Porter unpaid wages in the amount of at least $181,905." After alleging facts going to a pure breach of contract claim, only in the final paragraph do the Porters allege Deborah is entitled to attorney fees and costs she incurred in bringing this action, pursuant to California Labor Code section 218.5.

Ultimately, what the Porters alleged in the second cause of action was that W&T breached both the terms of the side letter and the implied covenant of good faith and fair dealing. They did not allege the side agreement was invalid; in fact, they invoked the terms of the contract throughout this portion of the complaint. In seeking to enforce the terms of a valid contract to recover unpaid wages, the Porters were legally precluded from simultaneously pursuing a quasi-contract claim to recover these wages. Accordingly, we find no error in the trial court sustaining W&T's demurrer to the quantum meruit claim.

III. The Court Did Not Admit Evidence Barred by Mediation Confidentiality

The Porters argue the court committed error by admitting evidence subject to mediation confidentiality. First, the Porters argue the trial court did not consider their argument that IDEA's

mediation confidentiality provisions preempt those contained in the California Evidence Code. Second, they contend the trial court improperly calculated the length of the mediation for purposes of determining mediation confidentiality.

A. IDEA

First, we find it troubling that the Porters assert on appeal that the trial court did not consider their preemption argument. The trial court expressly considered their position and rejected it. In its October 2016 order denying the Porters' motions *in limine*, the court stated: "the IDEA only preempts state rules governing administrative due process disputes . . . the IDEA does not expressly preempt the court's application of California Rules of Evidence to the present dispute." The court then cited to specific federal statutes and rules of procedure supporting its ruling. On appeal, the Porters do not assert any facts or argument to show the court ruled incorrectly on the issue. Their contention that the trial court did not even entertain the issue is disingenuous at best, and we will not disturb the court's ruling on appeal.

B. Mediation Confidentiality Under the California Evidence Code

For purposes of confidentiality under California law, a mediation ends when any one of the following conditions is satisfied: (1) the parties execute a written settlement fully resolving the dispute; (2) an oral argument fully resolves the dispute; (3) the mediator provides the participants with a signed writing stating the mediation is terminated; (4) a party provides the mediator and the participants with a writing stating the mediation is terminated; (5) for 10 calendar days, there is no communication between the mediator and any of the parties to

the mediation relating to the dispute. (Evid. Code, §1125, subd. (a).)

The Porters argue the court erred in determining the mediation ended on May 6, 2005, 10 calendar days after the April 26, 2005 mediation. Rather, they argue the mediation ended when the parties executed the settlement agreement on August 8, 2005. In resolving this question, we provide a brief review of relevant proceedings from the first trial, W&T's motion for JNOV, the trial court's denial of that motion, and our analysis of the issue on W&T's appeal.

After the jury found for the Porters in the first trial and we granted a new trial, the court heard W&T's motion for JNOV. The Porters opposed the motion largely on the grounds that the evidence relied on by W&T was barred by meditation confidentiality. They asserted the parties to the mediation had waived the automatic termination provisions in Evidence Code section 1125, subdivision (a)(5) in a mediation confidentiality agreement executed by the parties to the mediation on April 26, 2005. Thus, they argued, the mediation did not end until the parties executed the settlement agreement on August 8, 2005. The court agreed with the Porters and sustained their objections to much of W&T's proffered evidence. The trial court also denied W&T's JNOV motion.

On appeal of the denial of the JNOV, Wyner argued the waiver in the confidentiality agreement was ineffective because one of the mediation participants, a party named Thompson, had not signed the confidentiality agreement. We noted in our decision that the confidentiality agreement stated it could be signed before, during, or after the mediation. We also noted that "Thompson signed the *settlement* agreement in the underlying

action, which called for all parties to expressly waive the provisions of the confidentiality agreement. Because Thompson could not validly waive an agreement she had never signed, we believe this presented a question of fact as to whether she signed the *confidentiality* agreement at some later time." (*Porter v. Wyner*, *supra*, B242025, at [p. 16], italics added.) In other words, we observed Thompson had signed the settlement agreement and had not signed the confidentiality agreement, which provided that the parties could sign it after the mediation. Thus, we left open the possibility that Thompson signed the confidentiality agreement—including the waiver of the automatic 10-day termination provided by statute—at some other time. This therefore presented a question of fact to be determined by the court in the second trial.

Before the second trial, W&T proffered Thompson's declaration, in which she testified to not knowing about the confidentiality agreement and having no recollection whether she ever signed the document. Given this testimony, W&T argued there was no waiver of the automatic 10-day termination provision in Evidence Code section 1125, subdivision (a)(5). The trial court agreed, and determined the mediation ended on May 6, 2005 because there was no communication between the mediator and any of the parties to the mediation during the 10 days following the mediation.

The Porters then filed six motions *in limine* seeking to exclude evidence they alleged fell within the mediation confidentiality protection. Their motions were premised on their renewed contention that the mediation confidentiality period ended on August 8, 2005, the date the settlement agreement was executed. Having already determined the mediation ended on

May 6, 2005, the trial court denied the motions, but only to the extent they would "seek to exclude evidence solely on whether it was derived" between May 6, 2005 and the execution of the settlement on August 8, 2005, or "on subject matter tenuously related to issues that may have been discussed" in the April 26, 2006 mediation session.

On appeal, the Porters contend this was error because Evidence Code section 1119, subdivision (a) provides the mediation confidentiality protection applies to evidence "made for the purpose of, in the course of, or pursuant to" a mediation. Thus, they contend, any evidence connected to the mediation, and the settlement negotiations arising therefrom, are barred by the Evidence Code.

However, Evidence Code section 1120, subdivision (a) expressly provides "[e]vidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation." Thus, evidence that is otherwise admissible or subject to discovery outside of a mediation does not " ' "become inadmissible or protected from disclosure solely by reason of [its] introduction or use in a mediation." ' " (*Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 161.) Indeed, the trial court recognized that mediation confidentiality only applies when a contested writing or statement " 'would not have existed *but for* a mediation communication, negotiation, or settlement discussion,' " citing *Lappe v. Superior Court* (2014) 232 Cal.App.4th 774, 784-785. Accordingly, the court ultimately ruled it would "entertain trial objections to proposed evidence

that definitely would not have existed but for the mediation session conducted on April 26, 2005."

The trial court made clear in its order that it was open to excluding evidence before and after the confidentiality period if the evidence would not have existed but for the mediation, provided the Porters raised the relevant objections. The Porters therefore had the burden of objecting at trial to evidence they believed to be subject to mediation confidentiality, even if the evidence existed before or after the duration of the mediation. Yet, they did not. Accordingly, the Porters have waived the issue on appeal. (*Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 10, fn. 7, citing *Regents of University of California v. Sumner* (1996) 42 Cal.App.4th 1209, superseded by statute on other grounds in *Simmons v. Ghaderi* (2008) 44 Cal.4th 570.)

IV. The Trial Court Properly Admitted Evidence That Deborah Fully Recovered on Her Lost Earnings Claim

To determine whether Wyner or W&T owed Deborah any compensation for the paralegal services she provided, the jury had to decide whether the $2.37 million in damages granted to the Porters in the federal action included payment of Deborah's lost wages claim.

The Porters allege it was error to allow respondents to introduce evidence that Deborah was compensated for her lost wages as part of the settlement proceeds. The crux of their argument is that Deborah could not have recovered lost earnings in the underlying settlement because lost earnings are not recoverable under IDEA. Accordingly, they argue the trial court erred when it gave the following jury instruction: "Recovery for

lost earnings is consistent with the purposes of [the IDEA]. The IDEA does not restrict or limit an injured person's rights and remedies under civil rights laws, including claims for lost earnings, after all of the educational remedies available under the IDEA have been obtained."

It is true lost wages and other money damages are not compensable under IDEA. (*Kutasi v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 494 F.3d 1162, 1168.) This does not, however, compel the conclusion that recovery for lost earnings is "inconsistent" with IDEA, because parties routinely recover lost earnings and other money damages under various civil rights statutes. Indeed, the Porters' third amended complaint in the federal action sought compensatory and monetary damages under the Civil Rights Act (42 U.S.C. § 1983) and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). Specifically, the Porters alleged, "[a]s a direct and proximate result of the acts and omissions alleged in this Complaint, Student's Parents have incurred legal fees, and pain and suffering, will incur substantial expenses for Student's education, development and future support, and *Student's Mother has incurred lost wages*, all in an amount subject to proof at trial." (Italics added.)

Given that the settlement resolved the entire federal action which included IDEA and non-IDEA civil rights claims, we find no error in allowing Wyner and W&T to proffer evidence that Deborah was compensated for her unpaid wages as part of the settlement proceeds. Nor was it error for the court to instruct the jury that recovery for lost wages is consistent with IDEA.

V. The Porters Forfeited Their Attorney Misconduct Claim

The Porters allege the defense attorneys committed misconduct by portraying them as wealthy tax evaders "who were depriving public schools of funding," and by violating the court's ruling on a motion in limine excluding evidence and testimony concerning the Porter's family trust. After a close review of the record, we conclude the Porters not only forfeited much of their claim, but they also have not provided us with enough evidence or argument to analyze the issue.

In their opening brief, the Porters cite to various excerpts of allegedly improper argument and questioning in the trial transcript. Wyner and W&T point out in their respondents' brief that the Porters never objected to any of the allegedly improper argument or questioning cited in their opening brief. Upon reviewing the citations, we agree.

The Porters do not refute this; rather, in an attempt to avoid having forfeited their attorney misconduct claim on appeal, the Porters provide at least 15 citations to the trial transcript in their reply brief, none of which are included in their opening brief. Most of these citations point to short, discrete statements of witness testimony, and the transcript reveals the Porters objected to all but one of these brief statements. One of the citations reveals no objection.

With respect to the overruled objections, the Porters provide us with no argument or discussion as to why the court erred in overruling these objections, or how they were prejudiced by any of these alleged errors. They simply provide string citations to the trial transcript at the end of two paragraphs of their reply brief. Without more, we will not address whether it

was error to overrule these seven objections. It is not for us to develop arguments as to why the court's evidentiary rulings were incorrect or prejudicial. Accordingly, the Porters have forfeited their claim of prejudicial misconduct on appeal. (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1411-1412 [failing to object to attorney misconduct forfeits claim on appeal].)

DISPOSITION

The judgment is affirmed. Parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

BIGELOW, P. J.

ADAMS, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.